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Supreme Court, U.S.
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No. 92-934

In The

Supreme Court of the United States

October Term, 1992

THEODORE B. GOULD,

Petitioner,

v.

FRED STANTON SMITH, as TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, and THE BANK OF NEW YORK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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ISSUES PRESENTED

I. Did the Bankruptcy Court and District Court properly find the Petitioner in contempt?

II. Did the Bankruptcy Court and District Court properly impose sanctions?

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BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

INTRODUCTION

The Petitioner is no stranger to this Court. The current petition is his tenth for writ of certiorari filed from appeals in five bankruptcy cases.[1] The Petitioner has also

[1] Case Nos. 90-1551, 90-1361, 90-761, 90-676, 89-917, 89-864, 89-708, 88-80, and 87-1988. References to the Petitioner's Appendix will be denoted as "___a."

previously filed a petition for writ of mandamus.[2] On only one occasion, *Holywell Corp. v. Smith*, ___ U.S. ___, 112 S.Ct. 1021 (1992), has this Court found one of the petitions worthy of review.[3]

Moreover, Petitioner again comes to this Court after presenting the same arguments over the past eight years to:

Two different bankruptcy judges;

Ten different district court judges in over 30 separate appeals; and

Nine judges of the United States Circuit Courts of Appeals in over twenty separate appeals and in petitions for writ of prohibition and mandamus. None of those appeals have been successful.

JURISDICTION

The Petitioner seeks review of the Bankruptcy Court's order of August 14, 1989, and the District Court's order of May 17, 1991, finding him in contempt and imposing sanctions for his refusal to turn over cash proceeds of approximately $67,500 to a court-appointed trustee. Because Petitioner has failed to demonstrate either the existence of a conflict among the United States

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[2] Case No. 87-1989.

[3] In that case, it is submitted that the petition of the Solicitor General, and not that of the debtors, persuaded this Court to review a federal income tax issue relating to the bankruptcies.

Circuit Courts of Appeals or the existence of an important question of federal law which has not been, but should be settled by this Court, *see* Sup. Ct. R. 10.1(a)-(c),[4] no jurisdictional basis has been established for granting the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner Theodore B. Gould ("Gould"), along with four entities he either owned, controlled or dominated,[5] the Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin"), were involved in developing the Miami Center Project ("Miami Center"), a thirty-five story office building and hotel complex situated at a bay-front site in downtown Miami, Florida. The Bank of New York ("Bank")[6] was the

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[4] *See Braxton v. United States*, ___ U.S. ___, ___; 111 S.Ct. 1854, 1857 (1991) (a principal purpose of this Court's certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law).

[5] Petitioner owned 100% of Holywell's stock and also served as its president and director. Holywell, in turn, owned 100% of the stock of MCC, and Petitioner served as president and director of MCC. Petitioner and MCC were the sole general partners of Chopin and MCLP.

[6] Pursuant to Supreme Court Rule 29.1, the following is a listing of the relationships of The Bank of New York:

(a) Parent of the Bank – The Bank of New York Company, Inc.

(b) "Affiliates" of the Bank are:
BNY Holdings (Delaware) Corporation

lead construction lender for the Miami Center who, beginning in March of 1980, advanced over $196,000,000 under the terms of a series of notes, mortgages and other loan documents.

Petitioner and the entities were in default of their loan obligations as of February 1, 1984, and the Bank instituted a state court foreclosure action in July 1984. Shortly thereafter, on August 22, 1984, the Petitioner and the affiliated debtors[7] each filed voluntary Chapter 11 petitions in bankruptcy. The cases were initially consolidated for joint administrative purposes, and the debtor

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The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.C.
Affinity Group Marketing, Inc.
ARCS Mortgage Corporation (Florida)
ARCS Mortgage, Inc. (California)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Company, Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

[7] For the purposes of this Brief in Opposition, Petitioner and the four entities are hereinafter collectively referred to as "Petitioner and the affiliated debtors." Gould will be referred to individually as "Petitioner."

estates were later substantively consolidated by the Bankruptcy Court on July 23, 1985.[8]

Petitioner and the affiliated debtors, along with the Bank, each filed competing reorganization plans. On August 8, 1985, the Bankruptcy Court confirmed the plan proposed by the Bank ("Plan"), which called for the formation of the Miami Center Liquidating Trust ("Liquidating Trust"). *In re Holywell Corp.*, 54 Bankr. 41 (Bankr. S.D. Fla. 1985). The Liquidating Trust included all assets contained in Petitioner's and the affiliated debtors' bankruptcy estates. The Plan also required the Bankruptcy Court to appoint a trustee to liquidate and distribute all property in the Liquidating Trust to pay the claims of creditors. Any residual cash or property was to be returned to Petitioner and the affiliated debtors.[9] On October 10, 1985, the trustee began implementing the Plan in accordance with its terms.

Displeased with the Bankruptcy Court's ruling, Petitioner and the affiliated debtors appealed the decision to the District Court, which affirmed the confirmation order, *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), and the Court of Appeals for the Eleventh Circuit, which dismissed the appeal as moot because "the plan had been substantially consummated and . . . it had

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[8] Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and inter-debtor obligations are eliminated.

[9] The Plan also provided the Bankruptcy Court would retain jurisdiction after confirmation and until entry of a final decree in order "to make any orders which may be necessary or appropriate to carry out the provisions of this Plan."

become legally and practically impossible to . . . restore the status quo before confirmation."[10] *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988). This Court denied Petitioner's and the affiliated debtors' petition for writ of certiorari. *Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 823 (1988).

Having failed by direct appeal, Petitioner and the affiliated debtors commenced a series of collateral challenges designed to frustrate the confirmed and substantially consummated reorganization Plan. In August 1987, Petitioner and Holywell instituted a lawsuit in the Western District of Virginia in the name of Holywell's wholly-owned, non-debtor subsidiary, Twin Development Corporation ("Twin"). The action challenged the trustee's right to place Twin's stock in the Liquidating Trust. Both the Bankruptcy Court and the District Court for the Southern District of Florida ordered Petitioner and Holywell to cause the suit to be dismissed. Rather than comply with the Courts' rulings, however, they filed four more actions, in the name of four other wholly-owned Holywell subsidiaries, in the Western District of Virginia, challenging the trustee's right to proceeds from the sale of land owned by Twin. The Florida District Court held Petitioner and Holywell in contempt and imposed monetary sanctions equivalent to the Bank and the trustee's costs and reasonable attorneys' fees incurred in

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[10] Petitioner and the affiliated debtors had failed to obtain a stay pending review of the confirmation order.

defending the Virginia actions.[11] Petitioner and Holywell appealed the contempt order to the Court of Appeals for the Eleventh Circuit, which recently affirmed the District Court. *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).[12]

A second collateral challenge occurred in October 1987, when Petitioner and the affiliated debtors commenced an action in Florida state court against the Bank and trustee. The complaint alleged negligence, conversion, breach of contract and breach of fiduciary duty in connection with the bankruptcy proceedings, and claimed, *inter alia*, that the trustee had improperly failed to pay certain creditor claims, failed to establish a reserve for the payment of income taxes,[13] and illegally granted credits against the Liquidating Trust.

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[11] The District Court in Virginia entered summary judgment in favor of the Bank and trustee and against Twin. The Fourth Circuit Court of Appeals dismissed Twin's appeal.

[12] Undoubtedly, Petitioner will seek a writ of certiorari for the eleventh time in connection with this case.

[13] Because the reorganization plan failed to contain an express provision as to the payment of taxes, the trustee, in December 1987, filed an adversary proceeding in the Bankruptcy Court which named the United States of America ("United States"), the Bank, the Petitioner, and the affiliated debtors. The action sought declaratory judgment concerning the obligation to file tax returns and pay taxes with respect to property in the Liquidating Trust. The Bankruptcy Court held the trustee did not have an obligation to pay taxes or file returns. *In re Holywell Corp.*, 85 Bankr. 898 (Bankr. S.D. Fla. 1988). The District Court in an unreported decision, and the Court of Appeals, both affirmed. *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990). This Court reversed, holding that the trustee was required to file returns and pay taxes since Petitioner and the affiliated debtors would have had to do so had the Plan not assigned their property to the Liquidating Trust. *Holywell Corp. v. Smith*, ___ U.S. ___; 112 S. Ct. 1021 (1992).

The Bank and the trustee removed the case to the Bankruptcy Court pursuant to 28 U.S.C. § 1452 and Bankruptcy Rule 9027 and each filed a motion to dismiss. The Bankruptcy Court granted both motions and dismissed the action because: (1) the complaint failed to sufficiently allege that the trustee was guilty of gross negligence, willful default, or misconduct; and (2) all matters set forth in the complaint had either been determined by the Bankruptcy Court in other adversary proceedings or was in the process of being determined or being reviewed on appeal. The dismissal was appealed to the District Court, which affirmed, *In re Holywell Corp.*, 93 Bankr. 780 (S.D. Fla. 1988), and the Court of Appeals for the Eleventh Circuit, which affirmed without opinion. *Miami Center v. Bank of New York*, 881 F.2d 1086 (11th Cir. 1989). This Court denied the Petitioner's and the affiliated debtors' petition for writ of certiorari. *Miami Center Ltd. Partnership v. Smith*, 493 U.S. 1057 (1990).

The present petition brings to this Court yet another frivolous collateral challenge seeking to invalidate the reorganization Plan. In 1981 Petitioner purchased concrete pumps and related equipment that became property of the bankruptcy estate upon filing of the Chapter 11 petition and, upon confirmation of the reorganization plan, part of the Liquidating Trust. Despite knowledge that the pumps and equipment were assets of the Liquidating Trust, Petitioner sold the property and refused to turn over the cash proceeds of approximately $67,500 to the trustee.

At a hearing held on July 27, 1989, Petitioner advised the Bankruptcy Court that the proceeds were being held in a brokerage account and that he would not disclose the

name of the brokerage firm or any identifying information. He took the position that he would not turn over the proceeds even if the Bankruptcy Court *ordered him to do* so since the Liquidating Trust had been formed for the improper purpose of avoiding taxes and providing the Bank with a means of unjust financial enrichment. Petitioner stated that because the Liquidating Trust had been created for improper purposes, the Plan was unlawful, voidable and its terms unenforceable.

On August 1, 1989, the Bankruptcy Court entered an order finding the Petitioner in contempt and directing him to turn over the cash proceeds. The order stated that a fine of $1,000 would be imposed for each day that the proceeds were not delivered to the trustee.[14] On August 10, 1989, Petitioner moved for a stay and objected to the Bankruptcy Court's order on the grounds that: (1) the trustee had no interest in the property contained in the Chapter 11 estate, and (2) the Plan itself was invalid. The stay was denied. After notice by the trustee that Petitioner had failed to comply with the order, the Bankruptcy Court, on August 14, 1989, entered an "Order Certifying Theodore B. Gould to be in Contempt."

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[14] The Bankruptcy Court further stated:

> The Court finds and determines the imposition of this fine is a reasonable and necessary means of enforcing this Order given the persistent and deliberate refusal of [Petitioner] to obey the order of this Court and the frustration of the Liquidating Trustee's ability to perform his function as Trustee.

On December 14, 1990, the District Court conducted a *de novo* hearing on the contempt certification and on May 17, 1991, entered an order finding Petitioner in civil contempt.[15] It directed Petitioner to turn over the proceeds to the trustee and imposed a fine of $1,000 for each day that he failed to do so. The District Court also addressed the four grounds asserted by Petitioner in opposition to the contempt certification, rejected them all and accepted the findings of fact and conclusions of law of the Bankruptcy Court. In short, the District Court found that Petitioner had pocketed the proceeds of the sale of the concrete pumps and related equipment, without the trustee's consent, in direct violation of the Bankruptcy Court's order.

Rather than comply with the District Court's order, however, Petitioner moved for a stay and rehearing. In his motion, Petitioner revealed for the first time that the proceeds were no longer being held in a brokerage account, but instead had been used to pay counsel to pursue his ninth petition for writ of certiorari to this Court – to determine the Liquidating Trust's liability for the payment of income taxes. On June 25, 1991, the District Court denied the motion. On appeal the Eleventh Circuit, without opinion, affirmed *per curiam*. After a suggestion for rehearing *en banc* and motion for stay of

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[15] Although the District Court noted that Petitioner exhibited his contempt in the presence of the Bankruptcy Court by announcing his intention to disobey the Bankruptcy Court's order, the District Court concluded that Petitioner should only be held "at this time" in civil contempt.

mandate were denied, Petitioner came to this Court seeking review for the tenth time.

ARGUMENTS AGAINST GRANTING THE WRIT

Through the commencement of more than sixty appeals from Bankruptcy Court and District Court orders and nine petitions for writ of certiorari, the Petitioner, over the past seven years, has consistently ignored prior rulings and has attempted to systematically dismantle the confirmed and substantially consummated Plan. This petition is no different.

By defiantly disobeying the Bankruptcy Court and the District Court's orders, Petitioner again seeks to collaterally appeal the validity of the Plan, a matter conclusively decided more than four years ago when this Court denied the Petitioner's and the affiliated debtors' petition for writ of certiorari. *Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 823 (1988). This Court also has conclusively decided what Petitioner deems the Liquidating Trust's "unlawful and fraudulent scheme" to avoid taxes. *Holywell Corp. v. Smith*, ___ U.S.___; 112 S.Ct. 1021 (1992). Thus, even a brilliant and cunning act of legal legerdemain cannot resurrect these settled matters.[16]

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[16] In denying Petitioner's motion for stay and rehearing the District Court recognized Petitioner's strategy to have the Court collaterally review the reorganization Plan:

> Mr. Gould argues that if the Supreme Court reverses the Eleventh Circuit's determination that the Trust is not responsible for the claimed taxes, and if Mr.

Because Petitioner has conceded that the concrete pumps and equipment were assets of the Liquidating Trust and that he refused to comply with the Bankruptcy Court and District Court orders directing him to turn over the proceeds, there are but two issues for this Court to review: (1) whether the Petitioner was properly found in contempt, and (2) whether sanctions were properly imposed. Obviously, these are fact-intensive matters not worthy of this Court's consideration.[17]

> Gould then brings an action for breach of fiduciary duty against the Liquidating Trustee for not paying those taxes, and if Mr. Gould then obtains a judgment against the Liquidating Trustee, and if that judgment includes as damages Mr. Gould's attorney's fees in appealing the tax decision, then perhaps he could not be held in contempt for diverting trust proceeds and using the asserts (sic) for his own purposes. Mr. Gould's argument is speculative and hypothetical. Moreover, even if he should prevail as to the tax matter, the underlying realities of the instant action remain the same: Mr. Gould sold a Trust asset, kept the proceeds, and took such action without the consent of the Liquidating Trustee and in direct violation of a court order. It is for these things that he was found in *civil* contempt of court and directed to comply.

(32a-33a.)

[17] In a feeble attempt to increase his chances of having review granted, Petitioner has sought to manufacture a "conflict" within the Circuit Courts of Appeals by stating that the Eleventh Circuit's affirmance of the contempt order is in conflict with *Donovan v. Mazzola*, 761 F.2d 1411, 1417 (9th Cir. 1985), a Ninth Circuit decision which holds that present inability to comply with a court order is a complete defense to civil contempt. To the contrary, there is no conflict as the Eleventh Circuit has adhered to *United States v. Rylander*, 460 U.S. 752, 757,

I.

THE BANKRUPTCY COURT AND DISTRICT COURT PROPERLY FOUND THE PETITIONER IN CIVIL CONTEMPT

It is well established that all orders of a court must be complied with promptly and if a person to whom the court directs an order believes that it is incorrect, the remedy is to appeal. *Maness v. Meyers*, 419 U.S. 449, 458 (1975). Absent a stay, a court's order must be complied with pending appeal. *Id.* Moreover, the inherent power of the courts to punish contempt of their authority and to coerce compliance is not disputed. *Ex parte Terry*, 128 U.S. 289 (1888). Thus, one who makes a private determination of the law and refuses to obey an order generally risks contempt even if the order is ultimately ruled incorrect. *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922).

These decisions teach that Petitioner had the right to present his case to the Bankruptcy Court and to appeal, as he deemed appropriate, from an adverse ruling. Once the Bankruptcy Court made its determination, Petitioner had to abide and comply with the order and, absent a stay, was required to turn over the cash proceeds. The

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reh'g denied, 462 U.S. 1112 (1983), which holds that inability to comply with a court's order is a complete defense to civil contempt. *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984). Moreover, this case does not involve an inability to comply with the Bankruptcy Court and the District Court's orders. Petitioner has deliberately refused to obey the lower court's authority in the hopes that this Court would review the validity of the Plan.

Petitioner, however, chose not only to ignore the Bankruptcy Court and District Court's orders, but also demonstrated complete disdain for their authority by simply pocketing the proceeds.

Against this background, the Bankruptcy Court and the District Court's actions were clearly proper. The orderly and expeditious administration of justice requires finality of judicial decrees and orders. Granting certiorari to review such a trivial matter would send a wrong message to all civil litigants disgruntled by an adverse ruling.

As the Honorable John Brown, former Chief Judge of the Court of Appeals for the Fifth Circuit once explained: "People simply cannot have the luxury of knowing that they have a right to contest the correctness of the judge's order in deciding whether to willfully disobey it . . . Court orders have to be obeyed until they are reversed or set aside in an orderly fashion." *United States v. Dickerson*, 465 F.2d 496, 509 (5th Cir. 1972) (quoting *Southern Ry. Co. v. Lanham*, 408 F.2d 348, 350 (5th Cir. 1969), *cert. denied*, 414 U.S. 979 (1973)).

II.

THE BANKRUPTCY COURT AND DISTRICT COURT PROPERLY IMPOSED SANCTIONS

Sanctions for civil contempt may be imposed to coerce obedience with a court order, or to compensate the party pursuing the contempt action for injuries resulting from the contemptuous behavior, or both. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947). In determining how large a coercive sanction should be, the court

should consider the "character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction." *Id.* at 304.

Given the facts, the Bankruptcy Court and the District Court's imposition of monetary sanctions was neither an abuse of discretion, nor inappropriate, as both Courts sought to coerce Petitioner's compliance with their orders. Although Petitioner contends that a fine of $1,000 for each day of noncompliance violated the "excessive fines" clause of the Eighth Amendment, that Constitutional provision is not applicable in this situation.

The Eighth Amendment addresses bail, fines, and punishment,[18] and this Court has long "understood it to apply primarily, and perhaps exclusively to criminal prosecutions and punishments." *Browning-Ferris Indust. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989).[19] Consequently, the Eighth Amendment is not implicated when sanctions are imposed for civil contempt since sanctions are a civil remedy designed for the benefit of other parties to secure compliance with court orders. *Uphaus v.*

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[18] The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[19] This Court has had no difficulty finding the Eighth Amendment inapplicable to claims outside the criminal process. *Browning-Ferris*, 492 U.S. at 264 (excessive fines clause inapplicable to awards of punitive damages in cases between private parties); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (Eighth Amendment inapplicable to disciplinary corporal punishment in public schools); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (Eighth Amendment inapplicable to deportation of aliens because "deportation is not a punishment for crime").

Wyman, 360 U.S. 72, 81 (1959). *See Ingraham v. Wright*, 430 U.S. 651, 668 (1977); *United States v. City of Yonkers*, 856 F.2d 444, 459 (1988), *rev'd on other grounds sub nom. Spallone v. United States*, 493 U.S. 265 (1989) (excessive fines clause inapplicable to civil contempt sanctions imposed to secure prospective compliance with judicial decree); *United States v. Dien*, 598 F.2d 743, 745 (2d Cir. 1979).

Even if the "excessive fines" clause is assumed applicable in this context, a fine of $1,000 per day of noncompliance cannot be considered "excessive." This is especially true when one considers that Petitioner not only flagrantly disobeyed the lower courts' orders, but has abused the administration of justice by clogging the federal dockets with frivolous appeals.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

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